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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

TECHNICAL SERGEANT JOSE L. MARTINEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it found the evidence at the Appellant's court-martial legally sufficient to find him guilty of negligent homicide beyond a reasonable doubt.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Technical Sergeant Jose L. Martinez, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 13 September 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 42 M.J. 327 (1995), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Military Review, issued on 3 May 1993, is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 13 September 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1995) and 10 U.S.C. § 867(a) (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person, shall . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

During the early morning hours of 3 November 1990, the appellant's closest friend, Sergeant Armando Sauceda, died as a result of a motor vehicle accident. Sgt Sauceda was driving appellant's car at the time of the accident. The appellant and Sgt Sauceda had been drinking alcoholic beverages, celebrating Sgt Sauceda's scheduled permanent change of station from Zaragoza AB, during the evening prior to the accident.

The appellant arrived at Sgt Sauceda's dormitory room at approximately 2200 hours the evening prior to the accident. When appellant arrived at the dormitory room, Sgt Sauceda, a SSgt Grendzinski, and an Airman Delgado were already in the room. Sgt Sauceda offered the appellant a mixed drink and the appellant accepted. The appellant did not see Sgt Sauceda drinking anything at that time, although the other two men testified that they were drinking with the deceased prior to the appellant's arrival. Shorly after the appellant arrived at the dormitory room, the four men proceeded to the NCO Club on Zaragoza Air Base.

While at the NCO Club, from sometime shortly after 2000 hours (10 p.m.) until approximately 1230 (12:30

a.m.) hours the next morning, the appellant estimated that he and Sgt Sauceda had approximately three drinks each. One of the bartenders at the club, SSgt Hadley, testified that he only served Sgt Sauceda one drink that evening and that Sgt Sauceda did not appear drunk when he served him the drink.

The appellant, Sgt Sauceda, Airman Delgado, SSgt Grendzinski, and an Airman Foley left the Club at approximately 0100 (1 a.m.) hours to go to the chow hall to eat breakfast. At the chow hall, Sgt Sauceda ate a full breakfast of eggs, hashbrowns, coffee, and toast. After leaving the chow hall the appellant, Sgt Sauceda, Airman Delgado, and Sgt Foley returned to the dormitory. Airman Delgado testified that Sgt Sauceda appeared to be "fine" and his demeanor "wasn't anything abnormal" after leaving the Club that evening and while at the dormitory, although he qualified his statement by saying that his judgment was not so reliable since he was drunk. There was no evidence that the deceased drank any more alcohol after leaving the Club at approximately 0100 hours.

SSgt Grendzinski testified that Sgt Sauceda's condition was "fine" when he last saw him at the chow hall. Airman Foley testified that Sgt Sauceda was not slurring his speech, stumbling or falling down, or evidencing any change in personality than normal when he last saw him in the dormitory before the appellant and Sgt Sauceda left for downtown. There was no evidence that the appellant was intoxicated or impaired.

Shortly after returning to the dormitory, Airman Foley and Airman Delgado went to sleep in the dormitory room that Airman Foley and Sgt Sauceda shared. Airman Foley apparently told Airman Delgado that he could sleep in Sgt Sauceda's bed. The appellant and Sgt Sauceda remained in the dayroom of the dormitory, where they watched TV and dozed on and off until approximately 0300 (3 a.m.) hours, when they headed for downtown.

The prosecution called a Sgt Margaret Randolph, who testified that she spoke to Sgt Sauceda on the telephone at approximately 0230 (2:30 a.m.) hours. She stated that Sgt Sauceda "sounded very drunk." However, the defense brought out the fact that Sgt Randolph had had an extra-marital affair with the deceased, was extremely distraught by his death, and therefore may have been looking to blame someone for his death.

Another prosecution witness, Sergeant David Cordner, was alone in his dormitory room on this Friday night and looking for individuals who were causing trouble in the dormitory. He testified that he saw Sgt Sauceda in the bathroom between 0130 and 0200 hours "staggering" in front of the mirror. Sgt Cordner admitted on cross-examination he didn't render any assistance to Sgt Sauceda because he "didn't feel it was needed" since "he [Sgt Sauceda] appeared to me to be doing okay."

While the appellant and Sgt Sauceda were in the day-room, the appellant testified that Sgt Sauceda kept asking to go downtown. The appellant initially ignored the requests, but ultimately acceded to Sgt Sauceda's requests. The following colloquy occurred between appellant and the trial defense counsel concerning the driving arrangements that evening:

> Q: On the way to the car, again, did you see any signs of him being drunk?
>
> A: None at all.
>
> Q: Okay. When you got into the car, what happened after that?
>
> A: When we got in the car and he—Well, he didn't decide to drive, he always drove, so he took the keys. I don't remember whether I gave him the keys after I left the barracks or when we got to the car. So he took the keys.
>
> Q: Was it unusual for him to drive?
>
> A: No, ma'am, he always drove whenever we went out, because I don't know my way downtown. I always get lost.

Upon leaving the base, Sgt Sauceda drove through the front gate of the base, which required a gate guard to pull up a barrier to let them through the gate. The appellant stated that Sgt Sauceda was driving normally and was not weaving at all when they left the base. The appellant added that Sgt Sauceda had no problem negotiating a very sharp curve before getting onto the highway to Madrid.

The appellant then recounted the tragic moments leading up to the accident:

> We got onto the highway, started going. After you get on the highway, there's a gas station there, okay, and I remembered I turned that way (moving his head slightly downward), and at that point I opened my glove compartment. That's where I keep my radio. And I asked Mando if he wanted to hear some music, you know, just hear some music, there's no noise here. So I turned the radio on and the local—Our station was pretty hazy, so I started looking for a better station. What happened at that time, you know, I was too busy tuning the radio. (The accused became emotional and couldn't talk). The Court was recessed for a brief period, at which point the appellant continued.
>
> I was tuning my radio trying to get a clear station. And then at one point, I heard Mando say, "Oh shit." (the witness is trying very hard to control himself) I tried to look up when he said that, but at that time the car went down and bounced back up. So it was pretty violent—like we hit a ditch or a big hole. Went down and I went down also. When I came back up, all I could see was a guardrail coming at us. And that's what I remember. We were going from side to side, and when we finally came to a stop. I called "Armando," "Armando." I looked to the driver's side and he wasn't there. So I tried to open my door. I couldn't open it. So I went out through his door outside. Armando's lying on the concrete

and the car—(The witness was crying and could not continue).

The accident report revealed that the vehicle struck the median guardrail, flipped over onto its roof, entered the opposite lanes of traffic, and hit the guardrail on the far shoulder of the opposite side of the roadway. Sgt Sauceda was ejected from the vehicle during the accident and sustained head injuries ultimately resulting in his death at a Spanish hospital at approximately 0500 (5 a.m.) that morning.

The appellant was later charged with involuntary manslaughter by allegedly committing the culpably negligent act of allowing Sgt Sauceda to drive his vehicle while Sgt Sauceda was under the influence of alcohol. The appellant was ultimately convicted of the lesser included offense of negligent homicide.

The actual cause of the accident was vigorously disputed at trial. The prosecution contended that it was due to the intoxication of Sgt Sauceda and his resultant impaired ability to drive. The defense contended that Sgt Sauceda was not intoxicated or, at least, did not objectively appear intoxicated to those around him shortly before the accident.

Assuming that Sgt Sauceda was impaired, such impairment was not the proximate cause of Sgt Sauceda's death. The defense introduced evidence to show that the poor condition of appellant's automobile was the proximate cause of Sgt Sauceda's death irrespective of whether Sgt Sauceda's faculties were impaired by alcohol consumption.

Master Sergeant Steven R. Holm, the only accident reconstruction expert to testify at the appellant's court-martial, testified that in his expert opinion, any one of the following faulty conditions of the automobile or a combination of them was the proximate cause of the accident:

(1) the automobile's non-uniform and tread-worn tires;

(2) the automobile's steering wheel, which was installed after market and was smaller than the origial wheel, thus exaggerating the response to a sudden turn of the wheel and causing the driver to more easily lose control;

(3) the automobile's suspension system and, specifically, the right A-arm, which may have been damaged prior to the accident; and,

(4) the fact that the high beams on the vehicle did not work, thus limiting the driver's visibility range at night.

Master Sergeant Holm also testified that the mechanics of the accident were inconsistent with accidents involving intoxicated drivers and that the reactions of Sgt Sauceda to the perceived danger were inconsistent with those of an intoxicated driver.

Finally, dark tinted prescription glasses, which Sgt Sauceda at times wore, were found next to his body. There was further evidence that Sgt Sauceda had not been wearing his seat belt at the time of the accident (the appellant was), and that the high beams on the car's headlights had not been used. The question of Sgt Sauceda's possible contributory negligence, looming so large that it effectively severed the appellant's negligence as a superseding intervening cause, was discussed by Judge Wiss in his concurring opinion at the United States Court of Appeals for the Armed Forces.

The appellant was acquitted by the court-members of involuntary manslaughter (10 U.S.C. § 919(b)) (West Supp. 1994), but was found guilty of the lesser included offense of causing the death of Sgt Sauceda by simple negligence (negligent homicide) (10 U.S.C. § 934) (West Supp. 1994).

On appeal to the Air Force Court of Military Review, the Air Force Court did not address the later issue specified by the United States Court of Appeals for the Armed Forces. In granting review of the petition for re-

view filed by the Appellant, the United States Court of Appeals for the Armed Forces specified the following issue:

> WHETHER APPELLANT MAY BE CONVICTED OF NEGLIGENT HOMICIDE UNDER THE FACTS OF THIS CASE.

The United States Court of Appeals for the Armed Forces, in affirming the findings and sentence, concluded that the appellant had been given sufficient notice under the Fifth Amendment that the conduct in which he engaged in on 3 November 1990 was "a punishable service disorder under Article 134." Further, the Appellant had been provided sufficient notice under its prior decisions in *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986) and *United States v. Gordon*, 31 M.J. 30 (C.M.A. 1990). *Martinez, supra.* The Court did not specifically address the question as to whether or not the facts admitted into evidence at the appellant's court-martial were sufficient for any rational trier of fact to find the appellant guilty of negligent homicide beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND THERE WAS SUFFICIENT EVIDENCE UPON WHICH ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE APPELLANT GUILTY OF NEGLIGENT HOMICIDE BEYOND A REASONABLE DOUBT.

In *Jackson, supra,* the Supreme Court reaffirmed that it was "axiomatic that a conviction upon a charge not made constituted a denial of due process." 443 U.S. 314, *citing Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948) and *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.E.2d 207 (1978). Thus, no person "shall be made to suffer the onus of a criminal

conviction except upon sufficient proof." *Jackson*, 443 U.S. 316. The test to apply in determining the legal sufficiency of a conviction was defined in *Jackson* as whether, after viewing the evidence in the light most favorable to the prosecution, any rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In the appellant's case, the evidence does not support a finding beyond a reasonable doubt that the appellant acted negligently when he provided his car keys to his friend in order to drive he and his friend into town.

Taken as a whole, in the light most favorable to the prosecution, the facts discussed under the Statement of the Case did not establish that the appellant was negligent beyond a reasonable doubt.

CONCLUSION

As the Supreme Court noted in *Jackson*, "[a] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury." 443 U.S. 317. Appellant Court judges are no less fallible. The appellant's conviction for negligently causing the death of his friend should not stand.

Respectfully submitted,

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